Central Law Journal.

ESTABLISHED JANUARY, 1874.

Vol. 73 ST. LOUIS, OCTOBER 20, 1911. No. 16

Central Law Journal.

ST. LOUIS, MO., OCTOBER 20, 1911.

INTRASTATE RATE THOUGH NOT COMPENSATORY FOR INTRASTATE BUSINESS HELD REASONABLE BECAUSE EQUAL TO INTERSTATE RATE.

Judge Sanborn held in the "Minnesota Rate Case," that a maximum intrastate rate was void for its interference with interstate rates, which were higher.

In Washington Southern Ry. Co. v. Commonwealth, 71 S. E. 539, decided by Virginia Supreme Court of Appeals, the maximum intrastate rate of 2½ cents a mile was held reasonable, notwithstanding it was shown that even five cents a mile would not support a particular railroad as to all intrastate business it might obtain within every bound of probability.

As part, however, of an interstate system it appeared that even less than 2½ cents was compensatory and this was being charged. It was said: "Its (the road's) strictly intrastate business is only an incident to its general business and almost a negligible consideration," as the road is only 36 miles long and merely fills a gap in the general mileage of the system.

Speaking of the decision in the "Minnesota Rate Case," and the results from the intrastate rate which Judge Sanborn held invalidated it, the Virginia Court says: "No such results can be predicated of the action of the commission under the facts of this case. There is no contention on the part of the appellant (the railroad) that its earnings from its general operations, even at a lesser rate than the maximum rate fixed by the commission, are not ample to meet all lawful demands upon it and to make a fair return on the capital invested and for services rendered to the public. Indeed, the record shows that in the unrestrained course of business the company adopted a lower schedule of charges, both for intrastate and interstate passenger service, than the rate allowed by the commission. This fact alone would seem to afford a conclusive answer to appellant's contention."

As we take it, all of this is saying, either that the railroad was presenting a moot question, or that all of the estimates about a confiscatory rate toppled like a house of cards before the conceded fact that the railroad was earning fair compensation at a lower rate.

But a suggestion coming to us seems not inapt as testing Judge Sanborn's ruling. Suppose the Virginia commission in regulating the intrastate part of the system which enables this short road to earn compensation at less than the state maximum, were to make what would be otherwise reasonable regulations, might they be deemed a forbidden interference with interstate commerce, if compliance with them involved such additional expense as to cause an increase in the interstate rate? These regulations might be imagined to render the interstate rate no longer compensatory.

If the regulations were in the fair exercise of a state's police power, would that save them from invalidity, even if the principle maintained by Judge Sanborn might be considered to apply?

We have thought that the absolute power of Congress in the regulation of interstate commerce need not halt at any obstacle, that might be interposed by the police power of a state. At the same time, as we catch the trend of decision by the federal Supreme Court, if what a state does, by virtue of that power directly interferes with the regulation of interstate commerce, generally speaking, the Supreme Court will push it aside, but what indirectly interferes, it will permit to stand.

What is direct interference and what is indirect interference may frequently be debatable, but it is hard to see that an act by a state, which has a tendency to lower an interstate rate, may be any more an interference than an act which produces the opposite effect.

Both sorts of interference move along the line, or, at least, toward the possibility, of preventing an interstate carrier from

performing compensatory service, and one is as direct to that result as the other.

This brings us again to our query, whether the incident of the one being under a state's police power, when the other is not, may help towards declaring the former an incidental or indirect interference.

The results in both cases might be deemed inevitable, that is to say, they bring about a change of rates by interstate carriers, raising in the one case and lowering in the other. It would seem strange to say the latter may be forbidden, because it deprives the carrier of fair compensation, and the other not, because it is at the cost of the people, for whose benefit only is interstate commerce to be regulated by Congress.

The police power of one state is, of course, like its legislation, intended to have no extraterritorial effect, that is to say, it cannot operate directly outside of a state's borders, but in many ways it is conceivable that it may have influence on contiguous states.

For example, liquor prohibition may affect the trade of a neighboring state and tend also to provoke lawlessness on its border. No one, however, would contend that the public policy of either should be restrained, however necessary such result would ensue.

Nor would any kind of legislation by one state, whether it was referable to police power or otherwise within the domain of rightful legislation, be assailable, however grievously it might affect, as a consequence, that of another state or its morals or prosperity.

In the same way as states take with each other the chances of weal or woe from independent, but opposing policies, so, it seems to us, does Congress. In other words, the commerce, as Congress is entitled to view it, is in the condition that these independent policies leave it. Congress is not to create commerce, but to take it, for regulation, as it finds it.

Whenever this view is departed from, there is no end to the reach of congressional activity under the guise of regulation. One court may declare that a certain interference is direct interference with regulation, and again that which closely resembles it may be declared innocuous.

If the courts will stop talking about states interfering with interstate commerce, and being therefore unlawful, and begin to denounce only those acts which interfere with the *regulation* of interstate commerce, state and national power will take on less the appearance of opposition and the spheres of each be recognized. Commerce belongs to the states; its *regulation*, to Congress.

NOTES OF IMPORTANT DECISIONS

INTERSTATE COMMERCE — FEDERAL STATUTE AS TO TRANSPORTATION OF WOMAN FOR IMMORAL PURPOSES.—"The Lottery Case," under the title of Champion v. Ames, 188 Fed. 321, was decided by a majority of five to four, and as we understand the ruling the constitutionality of the statute in regard to Lottery Tickets was upheld solely upon the ground, that such tickets were articles of interstate commerce.

Now the case is relied on for authority as to the constitutionality of an act of Congress making it penal for a person to transport or assist or pay for transportation from one state to another of any woman for an immoral purpose. United States v. Warner, 188 Fed. 682.

We confess our inability to see how there can be any support for such a statute in the lottery ruling. A lottery ticket might be taken as property to the extent that the seller and purchaser are estopped to deny this, but how there is any different kind of commerce in the carriage of a passenger traveling for a good purpose than one traveling for an immoral purpose, both paying the same and furnished with the same kind of accommodations, it is hard to see.

How, indeed, does it regulate interstate commerce to say no man may assist a prostitute to pay her fare, when without assistance from another she may compel the carrier to transport her? The passenger is not objectionable as a passenger, and the national government knows nothing as to what she intends doing in another state, just because whatever she does in violation of state law is none of its concern.

THE NEW FEDERAL JUDICIAL CODE.*

The delegates to the Constitutional Convention of 1787 were absolutely united upon the one point of establishing a supreme court with supervising power, and for the special object of securing uniformity in the construction of the Constitution and laws of Congress.

The supreme court was vested with original jurisdiction in but two classes of cases.

1. Those affecting ambassadors and other public ministers and consuls.

2. Those in which a state shall be a party.

It was also granted such appellate jurisdiction as Congress should choose to authorize.

The jurisdiction of the inferior courts was limited in another paragraph of the same article. In it it was declared that the judicial power should extend:

1. To all cases arising under the Constitution and laws of the United States, and its treaties with foreign nations.

2. To such as affect representatives of foreign governments.

3. To all cases in admiralty.

4. To controversies in which the United States is a party.

5. To those between two or more states.

6. And finally to those dependent upon the alienage of one party, or diversity of citizenship, or the right to land under grants to different states.

No grant of criminal jurisdiction is expressly given, except the power to provide for the punishment of counterfeiting the securities and current coin of the United States, to define and punish piracies and felonies on the high seas and offenses against the laws of nations. There is, however, a recognition of the power of Congress to enact criminal laws and defining expressly the crime of treason, and in various amendments to the Constitution, the right to an indictment and trial by jury is guaranteed, as well as immunities against excessive fines and cruel and unusual punishments. The power to make criminal laws may also be included in the express power granted by the last paragraph of Article I, Section 8, "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers and all other powers vested by this Constitution in the Government of the United States, or any department or officer thereof."

It may be observed generally with regard to the grant of judicial power in the Constitution that, wherever power is given Congress to legislate, there is a corresponding power to make that legislation effective by investing its courts with authority to determine questions arising under its laws, as well as to prescribe penalties, and punish those guilty of an infraction of such laws. There is unhappily in every community a class of men who find it to their interests to evade laws intended for the protection of the public, or to extend laws of a remedial character to cases beyond their scope and ordinary signification. Within the limits imposed by the Constitution, Congress has full power to make its legislation effective.

The Constitution thus fulfilled its obligation to the country by defining the judicial power under that instrument. It became the immediate duty of Congress to create and organize the inferior courts provided by it, and to parcel out and distribute among them the new jurisdiction. Congress at its first session responded to this demand by the Judiciary Act of 1789. This was probably the most important and the most satisfactory act ever passed by Congress. The honor of drafting it belongs principally to Oliver Ellsworth, afterwards Chief Justice of the Supreme Court. While it has been several times amended and its

[*This is that part of the address of Justice Brown before the American Bar Association at Boston on August 30, 1911, which treats of the changes made by the new federal judicial code. The views of the venerable jurist herein expressed are so wise and helpful as to deserve a permanent place in any lawyer's library.—Editor.]

phraseology changed, the general structure established by it has remained essentially unaltered for a hundred and twenty years. This itself is a magnificent tribute to the wisdom of the act and the foresight of its draftsman.

After prescribing the number of Justices of the Supreme Court, the act proceeds to divide the country into thirteen districts—one for each state—and three circuits, with a district court for each district, and a circuit court for each circuit, composed of two Justices of the Supreme Court and a district judge—evidently a court of great dignity and importance. Both of these were courts of first instance. To the district courts was given jurisdiction of admiralty and maritime cases and seizures for violation of the revenue laws; of certain suits of limited amount by the United States, and of all suits by aliens for torts. It was also endowed with a very limited criminal jurisdiction, which was extended in 1842 to all cases not capital.

To the circuit courts was allowed jurisdiction concurrent with the state courts of law and equity of suits involving over $500 in value, subsequently raised to $2,000, and again to $3,000, and the United States are plaintiffs, or one party is an alien, or there is a diversity of citizenship. Also a jurisdiction of criminal cases, not already bestowed upon the district courts. This jurisdiction was also limited by certain restrictions as to the venue, and as to causes of action which had been assigned by the original party, which are still continued in force. Provision was also made for the removal to the circuit court of cases from the state courts which might have been originally begun in the circuit court.

The supreme court was vested with the original jurisdiction given by the Constitution, with a proviso in a few cases that it should not be exclusive. Power was also given to issue special writes of *scire facias, habeas corpus* and the like. An appeal was allowed from the district to the circuit court in admiralty cases involving $300, subsequently reduced to $50, and a writ of error in civil cases involving $50, and also a writ of error from the circuit to the supreme court in cases involving $2,000.

By the 25th section, one of the most important and stoutly contested of all, a writ of error was allowed from the supreme court to the highest state court wherever a federal right was claimed and a decision made adverse to such right. The constitutionality of this law was denied in a unanimous opinon of the Supreme Court of Virginia and affirmed in a unanimous opinion of the Supreme Court of the United States, reversing that case. It has furnished, particularly since the adoption of the Fourteenth Amendment, a large number of the most important cases to the supreme court, and its constitutionality is now universally acquiesced in.

A singular provision of the 29th section requires that capital cases shall be tried in the county where the offense was committed, if it can be done without great inconvenience. This clause is probably unknown to most members of the bar; has never been put in force, and yet has been carried through successive revisions to the present day. It seems to belong to the lumber room of federal jurisprudence.

The remainder of this famous act is taken up by details of organization and procedure, such as the appointment of clerks, marshals and district attorneys; the selection and empanelling of juries; the production of books and papers; the taking of deposition and the service of process, most of which remain practically unchanged. Indeed, the most wonderful thing about the act is that, while the number of districts and judges has been enormously increased, and its different sections have been broken up and rearranged, its phraseology altered, and the jurisdiction of the courts enlarged—notably by the inclusion of suits upon patents and copyrights and by cases arising out of the recent amendments to the Constitution—the leading features of the act and its general structure are practically the same as in 1789.

It will be noticed that by the Judiciary Act the power of the courts to issue writs of error is limited to civil cases. This remained the law until 1879, when the circuit courts were given power to issue writs of error to the district courts in criminal cases, and in 1889 the supreme court was authorized to issue writs of error to any court of the United States in capital cases. It may be said to the credit of the district and circuit courts that, in the ninety years in which their judgments were made final in criminal cases, I know no case in which it was charged that their power was oppressively exercised, and that a writ of error was finally allowed more from a conviction that a criminal ought not to be deprived of any remedy allowed to parties in civil cases, than from any belief that this power had been abused in practice. The same sentiment has brought about the establishment of a court of criminal appeals in England. Within certain limitations this power of review is certainly a proper one, though it is a mistake to suppose that under any conceivable system an innocent man may not occasionally be convicted. But the extent to which it has been exploited to secure reversals for technical reasons is an abuse which ought to be limited to a power of reversal where the appellate court can see upon a review of the case that an injustice had been done, or at least might be done if the judgment were affirmed. The reversal of convictions for technical errors not affecting the merits is a standing reproach to modern American jurisprudence.

The adoption of the Fourteenth Amendment to the Constitution imposed upon the states certain obligations which had long before been imposed upon Congress, and which had been recognized as familiar restrictions upon legislative power from time immemorial. It opened a door at once to writs of error from the supreme court to the state courts in cases wherein it was charged that the state legislature had transcended its power, by abridging the privileges or immunities of citizens or depriving them of life, liberty or property without due process of law, or denying any class the equal protection of the laws. In addition to this, Congress freely exerised the power given by the fifth section of this amendment, to enforce its provisions by appropriate legislation, and permitted suits and prosecutions connected therewith to be brought in the federal courts. This amendment has been an exceedingly fruitful source of litigation and many of the most important cases in the supreme court have turned upon the proper interpretation of these immunities.

Owing to a large increase of business following the Civil War, Congress, in 1869, created a circuit judge for each of the nine judicial circuits with power to hold the circuit courts and to hear appeals from the district court, which had hitherto been the duty of the associate justice assigned to each circuit.

In 1886 Congress authorized the appointment of commissioners "to revise, simplify, arrange and consolidate all statutes of the United States general and permanent in their nature." The result of their labors was the Revised Statutes of 1873—a production of great value to the profession and public, but which contained no legislation beyond what was incidental to breaking up the original sections, and redistributing their clauses under appropriate heads. The want of a convenient reference to existing legislation had long been felt, and could only be supplied by rummaging through some twenty volumes of Statutes at Large, or trusting to the accuracy of Brightley's Digest, which was then the *vade mecum* of every lawyer practicing in the federal courts. While the revision of 1873 was of great value to the profession in its condensation of all the existing statutes in a single volume, it was found to be so inaccurate in its details that shortly thereafter bills were passed by Congress correcting some hundreds of errors found in the text, and in 1877, a new revision was authorized, and the work entrusted to Mr. Boutwell, who reported the revision in 1878

as a second edition to that of 1873. The mistake of attempting a revision of the entire statutory law in one act was made apparent to Congress by these revisions.

The constant and increasing accumulation of business in the supreme court, which had already left about 1500 cases upon the docket, created such an imperative demand for relief that, in 1891, Congess established a circuit court of appeals in each circuit, as courts of intermediate appeal between courts of the first instance and the supreme court; and made the court one of last resort in all except questions of jurisdiction, prize causes, capital criminal cases and constitutional cases.

There was, in addition, reserved to the courts of appeal a power to certify differences of opinion to the supreme court, as well as a corresponding power of the supreme court to order up cases by *certiorari* —a power frequently invoked, but very rarely exercised. The desire of a defeated party to have one more chance is only equalled by the reluctance of an overburdened court to grant it. The relief to the supreme court was immediate, and its docket was soon reduced from 1,500 to about 500 cases. The pendulum, however, has already begun to swing the other way, and at the beginning of the last term the docket showed 690 cases ready for disposition. It is evident that the time is not far distant when some other method must be devised for restricting still further the jurisdiction of the supreme court.

The New Judicial Code had its origin in a commission authorized by Congress in 1897, "to revise and codify" the criminal and penal laws of the United States. This revision was passed in 1909 and became operative in 1910. While this commission was engaged in its duties, Congress, in 1899, enlarged its powers by authorizing it to revise and codify the laws concerning the jurisdiction and practice of the courts, including the Judiciary Act of 1789, and the amendments thereto. In 1901, Congress again enlarged its powers by authorizing it to revise and codify all the permanent laws of the United States not only by omitting obsolete enactments, but by proposing changes in existing laws, with their reasons for the same. From the report of this commission it selected for separate consideration the "judicial title," which, upon its adoption became the Judicial Code, as a revision of the entire law was thought to be too great a task.

One who anticipates in a new judicial code, a complete reorganization of the federal judicial system, or other radical departure from the present historical plan, will probably be disappointed by an examination of the new code. The plan which for a hundred and twenty years has worked so successfully remains practically unaltered. The changes have been rather in form than in substance, and that marvelous creation—the Judiciary Act of 1789—slightly mutilated and much changed in phraseology, still throws about its litigants the aegis of its protection. It is still the resort of aliens, of citizens of different states, of patentees, authors, mariners and even bankrupts, under conditions which have not essentially changed since the act was passed. The great principles enunciated by Marshall and Taney have grown in favor with the lapse of years, from a halting acquiescence to a universal and cordial acceptance. The supremacy of the supreme court in cases involving the construction of the Constitution and laws of the United States, once so stoutly contested, is now a maxim of American jurisprudence. The theory that the highest court of the state may declare the invalidity of an act of the legislature, has, since the decision in Marbury v. Madison, become the law of every state in the Union.

The most important change in the new Judicial Code consists in the abolishment of the circuit courts. As already observed, this was made by the Judiciary Act of 1789, a court of great distinction, held by two Justices of the Supreme Court and a district judge, with extensive appellate jur-

isdiction from the district court. It was of great value in bringing home to the people of every state the dignity and power of the supreme court in the person of two of its justices. It was and continued to be for a century the great court of original jurisdiction. Its fall was brought about by a series of statutes changing its personel and shearing it of its appellate power. By the act of 1793, the attendance of one of the two associate justices was dispensed with; but until the circuit courts were abolished, it was made the duty of the Justice of the Supreme Court to attend at least once in two years a term of the circuit court in each district in his circuit—a requirement far more honored in its breach than in its observance. Indeed, the increase in business in both the circuit courts and the supreme court made compliance simply impossible.

By the act of 1869, creating circuit judges in each circuit, a proviso was inserted that circuit courts might be held by the circuit justice or circuit judge, or the district judge, sitting alone, or together. This practice put an end to the superiority of the circuit court, though an appeal in admiralty was still reserved. Indeed, it had been ruled by Chief Justice Marshall as early as 1808, that a circuit court might be held by a district judge sitting alone, and such had been the constant practice for sixty years. It had been customary in all, except possibly a few of the largest districts, for the district judge to take up cases from both courts indiscriminately, and it was impossible for one not acquainted with federal jurisdiction, to tell in which court he was at the moment administering justice, although separate dockets and journals kept by separate clerks were provided for each. If a court possesses both original and appellate jurisdiction, it is pretty sure to become either an appellate court, or a court of first instance; and as the years passed by, the circuit court became more and more a court of original jurisdiction and less of an appellate court, until the circuit court of appeals was created, when its appellate character fell into abeyance and was transferred to the new court. The establishment of this court was really a *coup de grace* to the historical circuit court. It evidently became a mere question of time when the courts should be consolidated, although from 1789 until the present day the jurisdictional distinction between the two courts was carefully observed, and a case brought into the wrong court would have been instantly dismissed.

Some criticism has been made of the abolition of the historical circuit court, but it appears to have arisen more from sentiment than from any fear of the practical operation of the measure. One objection of a somewhat serious character was, until amended at the last moment, deserving of special attention. That was the want of a central supervising authority over railways running through different districts, and subject in each district to the control of the district judge, whose jurisdiction is, of course, limited to his own district. Many of these railways, however, run not only through different districts, but through different circuits, and the difficulty of a harmonious management had been already encountered and successfully met by conferences between judges of these circuits. So far as concerns railways running through different districts or states within the same circuit, the exigency is seemingly met by section 56, providing that whenever a receiver is appointed of land or other property of a fixed character, lying in different states of the same circuit, his authority shall extend over all the property within the circuit, upon filing in each district a copy of the bill and the order appointing him, subject, however, to the disapproval of the court of appeals or circuit judge.

Of course, the clerk of the circuit court will share the fate of his court, but to offset this a large increase in the clerical force of the district courts will be necessary to meet the different classes of cases thrust upon it.

It should be noticed in this connection that, while the circuit courts are abolished, and it is contemplated that the only court of the first instance shall be held by the district judge, yet, wherever the business of a district court is too heavy for a single judge, a circuit judge may be designated to assist him, precisely as under the existing system, and a district judge may be designated to assist a circuit judge in another district.

A step in the direction of economy is found in a proviso that there shall be but one clerk of the district court in each district, whereas, in eight of the original seventy-eight districts, there were from three to six clerks, each of whom was entitled to a maximum compensation of $3,500. This particular kind of enterprise is discouraged by the code, which puts all upon an equality.

The 250th section strikes at an abuse which has existed ever since the creation of the Court of Appeals of the District of Columbia, by removing a discrimination which has occasioned much annoyance and unloaded the docket of the supreme court with a large number of cases which had no proper place there. In an act establishing that court an appeal was given to the supreme court in every case involving $5,000, regardless of the question at issue. This discrimination has been removed, and the appellate power of the supreme court limited to jurisdictional and constitutional cases, such as involve the construction or application of any law or treaty of the United States, or the validity of any authority exercised under the United States. This corresponds pretty nearly to the class of cases in which an appeal was allowed by the Circuit Court of Appeals act from the circuit and district courts, directly to the supreme court. The necessity for such restriction is apparent from the fact that under the present system about one case in every ten was brought up from the District of Columbia—a number grossly disproportioned to the population of the District as compared with that of the states.

A relic of an age long passed is also preserved in the 235th section, reserving to citizens of the United States the right to a trial by jury of all issues of fact. As no jury has ever been impanelled within the memory of any living man, and but one or two in the whole history of the court, this proviso is valuable chiefly to the archeologist. The section was probably allowed to remain upon the principle that it is sometimes wise to concede what is harmless as a means of conciliating opposition to what is really important.

The Circuit Court of Appeals, established under the act of 1891, performs the work of an intermediate appellate court, which was originally intended to be performed by the circuit court when held by two justices and the district judge. It is believed to have worked to the entire satisfaction of the bar and of the country. Under the New Judicial Code, separate dockets will probably be required for different classes of cases, as in all the districts with which I have been acquainted separate dockets were kept in the circuit court for law and equity cases, and in the district courts, for admiralty, bankruptcy and criminal cases. This, however, is a matter of detail for each court to determine.

Another change made by the code, though less radical than the evolution of the circuit court, is one which will probably touch more closely the practice of every lawyer. It consists in raising the minimum jurisdiction in law and equity cases from $2,000 to $3,000. It has always been the theory of Congress, out of consideration for the convenience of defendants, and to prevent their being called from a distance to attend to trivial cases, to limit the amount of federal jurisdiction to a substantial sum, fixed originally at $500, raised in 1887 to $2,000, and now to $3,000. Considering the great fall in the value of money, this represents but little more than the original $500. Of course, this leaves untouched the power to have federal questions reviewed by the supreme court, whatever be the amount involved.

Under section 266 interlocutory injunctions against the enforcement of a statute of a state upon the ground of its unconstitutionality can only be granted upon a hearing before three judges, one of whom must be an associate justice or circuit judge, of which notice to the governor or attorney-general of the state is required.

These are the only practical innovations made by the new code upon the existing law. Other verbal and grammatical charges are numerous, but they are only such as were made necessary by the consolidation of the two courts of the first instance, and the repeal of obsolete statutes, for the better expression of the will of Congress. Certain chapters are added by way of revision of the existing laws respecting the Court of Claims, the Court of Customs Appeal and the Commerce Court, but they have little connection with the general judicial system. The changes made in the previous acts establishing these courts are little more than nominal, and their revision does not fall within the scope of this paper.

It will be noticed that the code does not include chapters upon pleading, evidence or procedure, which, in accordance with the policy of Congress not to attempt too much at one time, are reserved for a separate code, which has been prepared and will be submitted to Congress at its next session.

Great credit is due to Congress and to the revisors, not only for the conservative character of the new legislation proposed by them, and for the preservation of the most valuable features of the system inaugurated by the Judiciary Act, but for their resistance to innovations, which experience teaches us beset every attempt to revise the laws from thoes who would avail themselves of the opportunity of incorporating the views of a particular class of men, who would seek by discrediting the courts to undermine and ultimately destroy the independence of the judiciary. In short, the advantages derived from the code are only exceeded by the evils it escaped.

Detroit, Mich.

HENRY B. BROWN.

LIBEL AND SLANDER—PUBLICATION OF COURT FILES.

BYERS v. MERIDIAN PRINTING CO. et al.

Supreme Court of Ohio, June 30, 1911.

Syllabus by the Court.

The publication of pleadings or papers which have been placed on the files of a court, when the court has not yet acted thereon, is not privileged, even though the publication is made in good faith and without malice.

Error to Circuit Court, Cuyahoga County.

Action by one Byers against the Meridian Printing Company and others. From a judgment for defendants, plaintiff brings error. Reversed and remanded.

The plaintiff in error was plaintiff in the court of common pleas in which he filed his petition alleging that the defendants had published in a newspaper owned and controlled by them, viz., the Cleveland News, a libelous statement, which was in substance that warrants for the arrest of the plaintiff on the charge of perjury together with warrants for other persons for other felonious crimes had been sworn out before a justice of the peace by one L. A. Damschroeder. It was further stated in said article that Damschroeder asserts that the plaintiff committed perjury in swearing to the affidavit by which suit was brought, etc. The plaintiff's petition further alleged that he is an attorney qualified to practice in the courts, and that he is the person referred to in this article, and that so far as it refers to the plaintiff the language complained of is viciously false and untrue, and is calculated to injure the plaintiff in his reputation as a man, as a citizen, and in the practice of his profession and to bring him into public scandal, infamy and disgrace. He charges that he has been disgraced and humiliated, and his business has been injured thereby, for all of which he claims damages.

The defendants made a joint answer setting up three defenses. The first defense, after admitting the formal allegations of the petition and the publication of the article complained of, denies all and singular the averments of fact in said amended petition contained saving and excepting the averments hereinbefore expressly admitted to be true. In their second defense the defendants set forth a certain affidavit made by one Lawrence A. Damschroeder charging the plaintiff with perjury, and setting forth a warrant alleged to have been issued by the justice of the peace

with whom said affidavit was filed. And they further say that they thereupon caused the publication complained of to be made, and that the same is a fair and accurate report of the said proceedings had before the said justice of the peace. Further answering, the defendants say that they made said publication in good faith, relying on the said affidavit and warrant and said proceedings before the said justice of the peace, and they deny that in making said publication they were actuated by any malice whatsoever toward the plaintiff. For their third defense the defendants say that a reporter representing the defendant, the Meridian Printing Company, went to the office of the justice of the peace referred to in said publication and made inquiry as to whether or not a warrant had in fact been issued for the arrest of the plaintiff; that the said justice informed the reporter that the warrant had been issued, and that the reporter thereupon requested to see the files in said case, and the same were exhibited to him and examined by him, and he found in the file envelope an affidavit charging the plaintiff with perjury, and otherwise making charges against him as set forth in said publication; that the reporter also found in said file envelope a warrant for the arrest of the plaintiff duly signed by the justice of the peace, and that thereupon acting upon such examination and information he prepared the publication complained of which the defendants thereupon caused to be published. Defendants further alleged that at the time of the publication they believed and had reasonable grounds to believe that the statements contained in said publication were true; that they made the same in good faith and believed it to be by reason of the aforesaid inquiries a fair and accurate report of the proceedings had before the said justice of the peace. They further say as a part of said third defense that thereafter the plaintiff demanded that the defendants make retraction of the matter contained in said publication so far as it related to him, the said plaintiff, and that in response to this demand for a retraction, and acting on information from the plaintiff and statements made by him, without further investigation, and solely with desire to set right a possible wrong which they may have done the plaintiff, they promptly published a full and complete retraction of the same in as public a manner and as conspicuous a place as that in which they had made the original publication. A copy of this retraction is given. And they deny, further, that in making the said publication they were actuated by any malice whatever toward the plaintiff.

Demurrers to each one of the separate defenses filed by the plaintiff were overruled by the common pleas court. The plaintiff not desiring to plead further final judgment was entered for the defendants. To this judgment the plaintiff filed his petition in error in the circuit court which affirmed the judgment of the court of common pleas and this proceeding in error is prosecuted to reverse the judgment of both the lower courts.

Friebolin & Byers and P. L. A. Leighley, for plaintiff in error. Gage, Wilbur & Wachner, for defendants in error.

DAVIS, J. (after stating the facts as above.): We regard it as unnecessary to consider whether the demurrer to the first defense stated in the answer of the defendants should have been sustained. The demurrer to the first defense having admitted the facts pleaded for the purposes of the demurrer only, when the demurrer was overruled the issue made by the petition and the answer remained for trial; and therefore the court of common pleas erred in rendering judgment against the plaintiff on the pleadings, and the circuit court erred in affirming that judgment. That is the necessary result in the view which we take of the third defense.

(1) The second defense is evidently drawn with the intention of raising the point that the publication was one of a qualified privilege, and it is frankly admitted by counsel that this defense is irreconcilable with the ruling of this court in Cincinnati Gazette Co. v. Timberlake, 10 Ohio St. 549, 78 Am. Dec. 285, and accordingly a vigorous effort is made to show that the doctrine of that case is wrong and should now be overruled. We shall not undertake to review the cases which counsel have brought to our attention from other jurisdictions. It is sufficient to say that few, if any, of them are relevant to the precise facts of this case, and none of them is convincing to us that the case of Cincinnati Gazette Co. v. Timberlake, supra, was wrongly decided. Whatever may be said as to the authority, at the present time, of cases cited by the court in the opinion, the reasons given seem to be sound and even more applicable to the case now in hand than the one then under consideration. We quote from the opinion: "But in this case there is no claim that the charge against the plaintiff below was, in fact, *true*. The defense rests wholly on the claim of privilege. And if the publisher of a newspaper may, in virtue of his vocation, without responsibility, publish the details of every criminal charge before a police officer, however groundless, and whether emanating from the mistake or the malice of

a third party, then must private character be, indeed, imperfectly protected. Such publications not only inflict an injury of the same kind with any other species of defamation, but their tendency is also to interfere with the fair and impartial administration of justice, by poisoning the public mind and creating a prejudice against a party, whom the law still presumes to be innocent." What follows this quotation in the opinion might well be adopted, mutatis mutandis, in the present case.

The publication was not a fair and accurate report of any judicial "proceeding" or, still less than the Timberlake Case, of any purely "ex parte proceedings," for in that case a warrant had been issued and an arrest had been made, although the accused was discharged on the very day of the publication. In this case no action had been taken by the justice of the peace, no warrant had been "issued," and no arrest had been made. It appears from the alleged retraction which is set out in the answer that the affidavit had not been sworn to, and that the justice convinced the complainant that he could not maintain an action against the plaintiff, whereupon he took the affidavit away without having sworn to it. We cannot conceive of any process of reasoning, nor of any considerations of public policy, which would justify such a publication as this one was, under the facts of this case, as a privileged publication in the face of the well-supported doctrine that there is no privilege extended to the publication of papers which have been merely filed in court and on which there has been no judicial action. It was thus expressed in one case: "There is no rule of law which authorizes any but the parties interested to handle the files or publish the contents of their matters in litigation. The parties, and none but the parties, control them. One of the reasons why parties are privileged from suit for accusations made in their pleadings is that the pleadings are addressed to courts where the facts can be fairly tried, and to no other readers. If pleadings and other documents can be published to the world by any one who gets access to them, no more effectual way of doing malicious mischief with impunity could be devised than filing papers containing false and scurrilous charges, and getting those printed as news. The public have no rights to any information on private suits till they come up for public hearing or action in open court; and, when any publication is made involving such matters, they possess no privilege, and the publication must rest on either nonlibelous character or truth to defend sations may be discontinued without any attempt to try it, or on trial the case may entirely fail of proof or probability. The law has never authorized any such mischief. In Scripps v. Reilly, 35 Mich. 371, 24 Am. Rep. 575; Id., 38 Mich. 10, this court found it necessary to decline accepting the doctrine of it. A suit thus brought with scandalous accu- privilege in such cases." Park v. Free Press Co., 72 Mich. 560, 568, 40 N. W. 731, 734, 1 L. R. A. 599, 16 Am. St. Rep. 544. The same distinction was recognized and the doctrine applied in Cowley v. Pulsifer, 137 Mass. 392, 50 Am. Rep. 318; Sutton v. Belo & Co. (Tex. Civ. App.) 64 S. W. 686; Barber v. St. Louis Dispatch Co., 3 Mo. App. 377; American Pub. Co. v. Gamble, 115 Tenn. 663, 90 S. W. 1005; Stuart v. Press Pub. Co., 83 App. Div. 467, 478, 479, 82 N. Y. Supp. 401. We need not pursue the discussion of this subject further. The demurrer to the second defense should have been sustained.

(2) We come now to the consideration of a question of more serious import. The third defense was drawn under Revised Statutes, § 5094, as amended and supplemented by an act passed April 16, 1900; 94 Ohio Laws, 295. The effect of the amendment, as claimed by the defendants and upon the construction adopted by the United States Court of Appeals in Post v. Butler, 137 Fed. 723, 71 C. C. A., 309, is that "it is optional with the person libeled to stand upon his rights under the old law, or to waive a part by demanding and accepting a retraction under the law as amended." The federal court could see no way to sustain the statute as constitutional, except by adopting the construction above given; and we are of the opinion, for reasons that will appear, that even that construction, obviously resorted to for the purpose of saving the statute, will not relieve it from the taint of unconstitutionality.

The constitutional guaranties are that "every person, for an injury done him in his land, goods, person *or reputation*, shall have *remedy by due course of law*." Const. Ohio, art. 1, § 16, and, "No state shall make or enforce any law which shall *abridge* the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law." Const. U. S. Fourteenth Amendment. In Park v. Free Press Co., supra, the court say: "There is no room for holding in a constitutional system that private reputation is any more subject to be removed by statute from full legal protection than life, liberty, or property. It is one of those rights, necessary to human society, that underlie the whole social scheme of civilization. It is a thing which is more eas-

ily injured than restored, and where injury is capable of infinite mischief. And, on the other hand, it is one where the injury is frequently, and perhaps generally, aggravated by malice. The law has therefore always drawn distinctions between intentionally false and wicked assaults on character, and those which were not actually designed to create a false impression, although necessarily tending to injure reputation if false in fact, but it has made both actionable."

In McGee v. Baumgartner, 121 Mich. 287, 80 N. W. 21, the court approved and followed Park v. Free Press Co., holding that "The right to recover in an action of libel for damages to reputation, cannot be *abridged* by statute."

Now in what respect, if any, are the rights and privileges of the plaintiff abridged by the statute? Or, in what respect, if any, is he deprived of his remedy by due course of law? We confine ourselves to the consideration of the statute as construed in Post v. Butler, supra, because this defense is planted on Post v. Butler, and because if the statute *as therein construed* cannot be sustained as constitutional, it is conceded in that case to be unconstitutional. "Due process of law in each particular case means such an exertion of the powers of government as the settled maxims of the law permit and sanction, and under such safeguards for protection of individual rights as those maxims prescribe for the class of cases to which the one in question belongs." Cooley Const. Lim. § 356. Due process of law has also been defined to be, "Law in its regular form of administration through courts of justice." 2 Kent, Com. 10. It is obvious that it does not mean that anything which the Legislature may declare without regard to constitutional limitations is due process of law; for that would abrogate all guaranties of the Constitution. By settled principles of the common law, the publication of defamatory matter, which is false in fact and not privileged, is presumed to be malicious—that is, the plaintiff may recover without proving malice—and the burden is upon the defendant to disprove it. This is the substantive law, and not mere matter of procedure. By the common law, also, one who is injured by such a publication may, by natural right, demand an apology or retraction, but unless it were accepted as a satisfaction it would not be a complete defense, and would only be considered in mitigation of damages. This, again, is substantive law and not a matter of formal procedure. These rules have always been regarded as primary and essential in the law of libel for protection of reputation not only for injury which may be measured by money values, but for that "intangible but fatal influence which suspicion, helped by ill will, spreads beyond recall or reach by apology or retraction." And therefore they are to be regarded as part of the "remedy by due course of law" of which the Constitution declares that no person shall be deprived. These rights the Legislature did not give to the libeled person and the Legislature cannot take them away. We are not disposed to question, at least for our present purpose we will not, that a citizen may waive a constitutional right; but we do deny that he can be compelled to waive his right, or that he can be arbitrarily subjected to an option to stand upon one right under penalty of losing another. Under this statute the plaintiff is given the choice of resorting to the courts without the right of demanding a retraction, or of demanding a retraction, and, if given, being limited in his right of recovery; and if he chooses either course, he must do it at his own peril and without any recompense whatever. Recurring again to the opinion in Park v. Free Press Co., supra, "it is not competent for the Legislature to give one class of citizens legal exemption for wrongs not granted to others; and it is not competent to authorize any person, natural or artificial, to do wrong to others without answering *fully* for the wrong."

It was said in the argument that the circuit court in disposing of this case said that there could be no doubt that the Legislature had the power to change the presumption as to malice. The constitutional power of the Legislature to prescribe the presumptions of evidence and to change the rules of evidence was recently considered by this court in Williams & Thomas Co. v. Preslo, 95 N. E. 900.

That was a case in which property interests were concerned, and it was held that the provisions of the Constitution which require that law as regulating rights in property shall operate generally and equally, extend to statutes which prescribe presumptions and rules of evidence by which those rights are enforced. In other words, the guaranties of the Constitution, which are the same for the protection of property and reputation, shall be regarded by the Legislature as well in passing laws relating to evidence and remedies as to substantive law.

The demurrer to the third defense should have been sustained; and the judgments of the circuit court and court of common pleas are reversed and cause remanded.

SPEAR, C. J., and SHAUCK, PRICE, and JOHNSON, JJ., concur. DONAHUE, J., concurs in the first proposition of the syllabus, but does not concur in the second.

NOTE.—*Publishing Court Files in a Judicial Proceeding.*—The principal case concerns itself only with the publicaton of papers, which have not been acted on by a court. Upon this bare question authority seems with it. The courts seem, however, divided on the question, whether or not publication can be made of papers where no action other than of a preliminary character and *ex parte* in nature may be made, or merely a report of a trial may be published. We cite cases which seem to be on both sides of this question.

In the case of Todd v. Every Evening Printing Co. (Del.), 62 Atl. 1089, the allegel libed was a report of the contents of an affidavit for the procuring of a *capias*, and upon which a *capias* had issued, the defendant arrested, and the execution and delivery of a bail bond. It was contended pro and con as to whether there was a judicial proceeding, under the rule that a fair report of a judicial proceeding is privileged. This case followed the English rule as stated by Lord Ellenborough in Rex v. Fisher, 2 Camp. 563, where libel was alleged for the publication of a preliminary *ex parte* deposition, Lord Ellenborough said: "Trials at law, fairly reported, although they may occasonally prove injurious to individuals, have been held to be privileged. The benefit they produce is great and permanent, and the evil that arises from them is rare and incidental. But these preliminary examinations have no such privilege. Their only tendency is to prejudge those whom the law presumes to be innocent and to poison the sources of justice."

Under this reasoning it may even be libellous to publish a fair report of the finding of an indictment.

In Cowley v. Pulsifer, 137 Mass. 392, 50 Am. Rep. 318, the publication was a report of the contents of a petition for the disbarment of the plaintiff, but there it did not appear that anything more had been done with the petition than to file it in court. Judge Holmes (now Associate Justice Supreme Court), wrote an elaborate opinion, quoting extensively from English decision, and in the opinion he says: "It used to be said, sometimes, that the privilege (of publication) was founded on the fact of the court being open to the public. * * * This, no doubt, is too narrow as suggested by Lord Chief Justice Cockburn in Wason v. Walker, L. R. 4, Q. B. 73, 88; but the privilege and the access of the public to the courts stand in reason upon common ground. Lewis v. Levy, El. Bl. and Ed. 537, 558. It is desirable that the trial of causes should take place in the public eye, not because the controversies of one citizen with another are of public concern, but because it is of the highest moment that those who administer justice should always act under the sense of public responsibility, and that every citizen should be able to satisfy himself with his own eyes as to the mode in which a public duty is performed. If these are not the only grounds upon which fair reports of judicial proceedings are privileged, all will agree that they are not the least important ones. And it is clear that they have no application whatever to the contents of a preliminary written statement of a claim or charge."

Judge Holmes further says: "It may be objected that our reasoning tacitly assumes that papers properly filed in the clerk's office are not open to the inspection of the public. We do not admit that this is true, or that the reasons for the privilege accorded to the publication of proceedings in open court would apply to the publication of such papers, even if all the world had access to them." He then says he will not discuss the question because he thought that such papers as were in the case were not open to public inspection.

This, however, is one time we might have relished to some extent a little argumentative exposition.

Here the reasoning appears to exclude report in advance of a trial, but, as in the principal case, there had been no judicial action whatever.

In Beiser v. Scripps-McRae Publishing Co., 113 Ky. 383, 68 S. W. 457, it was held that an application to a justice of the peace to be permitted to make an affidavit for the purpose of instituting a prosecution is one step in a judicial proceeding, and that, even though the application be denied, a fair and impartial publication of the charge thus made is a privileged publication.

The court says: "It is conceded by the appellee (defendant) that according to the earlier cases, *ex parte* proceedings before inferior tribunals, and, indeed, preliminary hearings of charges, were not considered to be of a character which entitled their publication to be considered privileged. (Cases cited). On the other hand, it is admitted by appellant that the later current of opinion in both England and this country is to the effect that newspapers may publish *ex parte* proceedings provided they do so fairly and impartially."

The court then uses the same cases that Judge Holmes used, and does not see anything in them to exclude its conclusion.

In Hulbert v. New Nonpareil Co., 111 Iowa 490, 82 N. W. 928, there was a published report of an information filed before a justice of the peace, charging the plaintiff with seduction, of his being arrested and giving bond and the case being set over to a day later than the publication. The reasoning of the court appears to recognize the publication as privileged, if it had been a fair report, but the libel was sustained on the ground that it was not fair. The opinion says: "It was the privilege of the defendant to publish what had occurred before the justice, as shown by the files and docket in the case; but it was not privileged to add thereto, as was done, that which was false."

As up to the time the publication was made there had been no trial, and all proceedings, except the mere granting of a continuance by consent of parties, were nonjudicial, this case seems quite out of line with the others cited.

In Metcalf v. Times Publishing Co., 20 R. I. 674, 40 Atl. 864, 78 Am. St. Rep. 900, the opinion cites very much the same authority as the principal and other cases on that side, the alleged libel being the publishing of the charges of fraud contained in a bill in equity, upon which citation and an *ex parte* preliminary injunction had been ordered. The opinion, rendered in 1898, says: "The rule seems now to be settled as the law, both in England and in this country, and it makes a clear line of distinction between publications which are lawful and those which are not. It gives no license to publish libelous matter simply because it is found in the files of

a court. As a publisher of news and items of public importance, the press should have the freest scope; but as a scandal-monger it should be held to the most rigid limitation. * * * It is necessary to the ends of justice that a party should be allowed to make his charges against another for adjudication, even though they be of a libelous character, and as such they are privileged, the injured party having a remedy for malicious prosecution when they are made maliciously or without probable cause. But the right of a party to make charges gives no right to others to spread them. When the charges come up for adjudication, however, although their publication may be as harmful and distressing to the person accused as if they had been published before their consideration by a court, a different rule prevails."

But this case holds that it was a judicial matter for the court to decide whether a temporary injunction should issue, and therefore there was a proceeding in court, even though it was *ex parte* and in chambers, and a fair report could be made of the matter by a newspaper.

American Publishing Co. v. Gamble, 115 Tenn. 663, 90 S. W. 1005 was decided in 1905, and is one of the most elaborate of any of the cases on the subject we have seen.

It lays down flatly the proposition that the privilege and right to publish proceedings in court without liability for damages does not extend to mere pleadings filed in court, upon which there has been no judicial action.

This case is like that of Metcalfe v. Times Publishing Co., *supra*, in that the publication was merely the recital of a charge in a bill in equity and that a temporary injunction was issued, and the case follows the Metcalfe case.

The opinion says: "Applications for preliminary injunctions are in this state usually of the same *ex parte* character," as in Rhode Island. "The granting of the fiat was a judicial act. The bill, therefore, after having been made the subject of such action, and upon thereafter having been placed in the files of the chancery court, became a paper which might be published within the protection of the privileged list."

These two cases and the Kentucky case reject the *ex parte* idea, and they seem to us founded upon a technicality, that ought not to be recognized. The principal case well expresses the reason why pleadings merely filed should not become privileged vehicles or conduits in newspapers for libel, but, if the reasoning is valid, so also should it apply to everything preliminary to a trial, in which and in nothing else is that interest of the public of which Judge Holmes speaks. A litigant obtaining preliminary orders may abandon his case just as one who merely files pleadings without more. C.

CORRESPONDENCE.

A PROBLEM IN MARRIAGE AND DIVORCE.

Editor Central Law Journal:

When it comes to Marriages and Divorces, I think this is the limit. I procured a divorce for a woman here, in the Circuit Court, this week, from her much married husband. She was married to the defendant, at this city, in August, 1910. At that time, the defendant had a wife living in St. Louis and another in Cherokee County, Kansas. Wife No. 1, in September, 1910, procured a divorce from the defendant. In January, 1911, wife No. 2 obtained an annulment of her marriage, in the District Court of Cherokee County, Kansas, on the ground that the defendant had another wife living, from whom he was not legally separated. The decree provides that neither party shall re-marry within six months, and that such decree shall not become absolute until after six months from its rendition.

In February, 1911, wife No. 3 had her supposed husband arrested here, charged with bigamy. He entered a plea of guilty in the Criminal Court, and Judge Latshaw sentenced him to serve two years in the penitentiary, the defendant expecting to be paroled. When he was refused a parole, wife No. 3 came to his rescue, and mortgaged her property for $250.00, to an attorney, to obtain a new trial for the defendant, and a new trial was granted, and cause continued. In April, 1910, wife No. 3 again mortgaged her homestead for $1,000.00, to an attorney, to indemnify him for going on the defendant's bond and secure an additional attorney's fee of $250.00. While the defendant was still in jail, in April, 1911, wife No. 3 remarried him. The attorney signed his bond, and he was released from custody, when he was rearrested, and brought to Columbus, Kansas, to answer a charge of bigamy there, which charge is still pending, the defendant now being admitted to bail. The bigamy charge here was dismissed, when he was taken to Kansas.

The plaintiff was granted an absolute divorce, and the numerous bonds of Matrimony which the defendant has contracted, are now all dissolved. Fraternally yours,

FRANS E. LINDQUIST.

Kansas City, Mo.

HUMOR OF THE LAW.

The attorneys for the prosecution and defense had been allowed fifteen minutes each to argue the case. The attorney for the defense had commenced his argument with an allusion to the old swimming hole of his boyhood days. He told in flowery oratory of the balmy air, the singing birds, the joy of youth, the delights of the cool water—

And in the midst of it he was interrupted by the drawling voice of the judge.

"Come out, Chauncey," he said, "and put on your clothes. Your fifteen minutes are up."—Success.

"Halloa, Bill, have you heard about Jimmy Strong getting locked up?"

Bill. "No; what's he bin locked up for?"

Tom. "Why, he was outside a pub last night when the bobby told him to move on; but Jimmy wouldn't; so the copper called for assistance, and another coming on the scene, Jimmy got desperate and tossed them all over the place. After a while he was locked up, taken before the magistrate and fined 5 shillings and costs for gambling."

Bill. "For gambling? I can't see that."

Tom. "Why, for tossing coppers in the street!"

WEEKLY DIGEST.

Weekly Digest of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of all the Federal Courts.

1. **Action**—Involuntary Payments.—Payment of a fine imposed in a criminal case, even if the judgment of conviction was void, is not to be deemed a voluntary contribution to the government, and is not a bar to a suit to recover the money, if otherwise sustainable.—United States v. Rothstein, C. C. A., 187 Fed. 268.

2. **Attorney and Client**—Duty to Client.—An heir acting as an attorney in settling an estate held bound to disclose information to another from whom he took an assignment of her interest.—Fox v. Fox, Ill., 95 N. E. 498.

3.——Duty to Client.—So long as the relation of attorney and client exists, held, the attorney is trustee for the client in and about the cause or the subject thereof, so that any trade that he makes or benefits that he may derive, resulting from the litigation or sale of the subject thereof, will inure to the benefit of the client.—Singo v. Brainard, Ala., 55 So. 603.

4. **Attachment**—Fixtures.—Machinery and appliances attached to a mine by a vendee's assignee and constituting fixtures held not subject to attachment at the instance of the assignee's creditors as against the vendor, though the attachment was levied prior to the expiration of the assignee's rights under the contract of sale.—Conde v. Sweeney, Cal., 116 Pac. 319.

5.——Redelivery Bond.—Surety on redelivery receipt for attached goods held liable for the amount of a judgment recovered by plaintiff in attachment, on failure to redeliver the goods, though their value was less than the judgment.—Lannan v. Cimenera, Conn., 80 Atl. 156.

6. **Bailment**—Ordinary Care.—When a bailment is reciprocally beneficial to both parties the bailee must use ordinary care.—Michigan Stove Co. v. Pueblo Hardware Co., Colo., 116 Pac. 340.

7. **Bankruptcy**—Conditional Sale.—A bankrupt's trustee, entitled to claim that a contract in the form of a lease or bailment of a typewriter to the bankrupt was in fact a contract of conditional sale.—In re Franklin Lumber Co., D. C., 187 Fed. 281.

8.——Discharge.—A judge of a bankruptcy court, in his discretion, may appoint one other than the referee in bankruptcy as special master to hear a petition for the bankrupt's discharge, and when so appointed such person is entitled to reasonable compensation.—In re Gillardon, D. C., 187 Fed. 289.

9.——Election of Trustee.—That a bona-fide creditor of a bankrupt corporation was also a director and stockholder did not disqualify him to vote for a trustee.—In re Stradley & Co., D. C., 187 Fed. 285.

10.——Estoppel.—The filing of a claim on contract induced by fraud against a bankrupt's estate when plaintiff was not aware of all the material facts did not estop her thereafter to sue in tort.—Lund v. Bull, N. H., 80 Atl. 141.

11.——Filing Petition.—For jurisdictional purposes, bankruptcy proceedings are commenced by filing the original petition.—First Nat. Bank v. Masterson, Okl., 116 Pac. 162.

12.——Fraudulent Debts.—A bankrupt's discharge does not relieve him from liability for debts procured by fraud.—Lund v. Bull, N. H., 80 Atl. 141.

13. **Banks and Banking**—Collection of Draft.—A bank accepting a draft or bill for collection is liable for any default or breach of duty made by a subagent, to whom it transmits the paper for collection.—Second Nat. Bank of Baltimore v. Bank of Alma, Ark., 138 S. W. 472.

14.——Double Liability.—A judgment of a Colorado court, imposing a double liability on stockholders of a Colorado bank, held not binding on a stockholder residing in California, never brought within the jurisdiction of the Colorado court.—Miller v. Lane, Cal., 116 Pac. 58.

15.——Notice.—Where a bank, with knowledge of the trust character of funds deposited with it, permits a diversion thereof, and aids in the appropriation of the fund to the trustee's personal debt, it is liable to the beneficiary.—United States Fidelity & Guaranty Co. v. Adoue & Lobit, Tex., 138 S. W. 383.

16. **Bills and Notes**—Blanks.—Under Negotiable Instruments Law, § 33, a payee of a note, receiving as collateral a blank note bearing a third person's indorsement, held required, in order to hold the third person, to fill in the blanks in strict accordance with the authority given by the third person and in a reasonable time.—Union Trust Co. of New Jersey v. McCrum, 129 N. Y. Supp. 1078.

17.——Face of Note.—All that appears in writing or printing on the face of a note may be taken as a part thereof.—Brown v. City of Newburyport, Mass., 95 N. E. 504.

18.——Invalidity.—Notes given for an interest in a patent right not containing the words "given for a patent right," as required by Gen. St. 1909, § 5516, held void.—Bolte v. Sparks, Kan., 116 Pac. 224.

19.——Liability of Surety.—A surety on a note delivered in violation of an agreement that another surety should first sign it held liable thereon; the payee having no notice of such agreement.—Williams v. Morris, Ark., 138 S. W. 373.

20.——Negotiability.—Any uncertainty in any of the essential elements of a note to make it a negotiable note destroys its negotiability.—Halstead v. Woods, Ind., 95 N. E. 429.

21.——Negotiability.—A note held nonnegotiable, because the date on which it becomes due is uncertain.—Holliday State Bank v. Hoffman, Kan., 116 Pac. 239.

22.——Presumption.—Any person having a note payable to bearer or indorsed in blank in his possession will be presumed entitled to receive payment from the maker.—American Agricultural Chemical Co. v. Graham, Ga., 71 S. E. 761.

23. **Brokers**—Duty to Principal.—A broker employed to procure a purchaser may not become the purchaser himself.—Slagle v. Russell, Md., 80 Atl. 164.

24.——Statute of Frauds.—A contract for broker's services, partly written and partly oral, constituted an oral contract, invalid under the statute of frauds (Rem. & Bal. Code, § 5289, subd. 5).—Crouch v. Forbes, Wash., 116 Pac. 14.

25. **Cancellation of Instruments**—Equity.—A court of equity may cancel a fraudulent contract, though the injured party may sue at law upon the covenants of warranty therein, or for

deceit.—Southern States Fire & Casualty Ins. Co. v. Whatley, Ala., 55 So. 620.

26. **Carriers**—Act of God.—A carrier needlessly delaying a shipment of goods or failing to protect it from threatened danger held liable when damaged by the act of God, and such negligence is the concurring cause of the injury.—Sunderland Bros. Co. v. Chicago, B. & Q. R. Co., Neb., 131 N. W. 1047.

27.——Assault by Conductor.—Where a conductor struck a passenger, and another passenger was injured, the latter is entitled to recover.—Georgia Ry. & Electric Co. v. Rich, Ga., 71 S. E. 759.

28.——Contributory Negligence.—A carrier held to have the burden of proving a shipper's contributory negligence.—Houston & T. C. R. Co. v. Parker, Tex., 138 S. W. 437.

29.——Dangerous Freight.—A shipper of acids held bound at common law to notify the carrier concerning the character of the acids, and, having failed to do so, the carrier was relieved from liability for loss of the acids due to fire and explosion caused by leaking from the containers.—Bradley v. Lake Shore & M. S. Ry. Co., 129 N. Y. Supp. 1045.

30.——Estoppel.—In a prosecution of an interstate carrier for charging less than the filed rate, it was estopped to deny that it did not know of the rate filed, which it had itself established.—United States v. Merchants' & Miners' Transp. Co., C. C., 187 Fed. 363.

31.——Licensees.—Persons riding on trains, contrary to the carrier's rules, by permission of trainmen, held to be bare licensees.—White v. Illinois Cent. R. Co., Miss., 55 So. 593.

32.——Limitation of Liability.—A carrier limiting its liability in its bill of lading must show by evidence outside the shipping order and bill of lading that the shipper assented to the limitation.—Illinois Match Co. v. Chicago, R. I. & P. Ry. Co., Ill., 95 N. E. 492.

33.——Res Ipsa Loquitur.—Where a passenger suffers injury, the law, in the absence of explanation of the carrier, presumes that it was the result of the carrier's fault.—Birmingham Ry., Light & Power Co. v. McCurdy, Ala., 55 So. 616.

34.——Waiver of Compensation.—A voluntary waiver of all claim for compensation for carriage of a person does not take away the status of carrier.—Walther v. Southern Pac. Co., Cal., 116 Pac. 51.

35. **Commerce**—Establishing Rates.—A transportation company may, at the outset, establish its rates without previous application to the Interstate Commerce Commission and the question as to the reasonableness of such rate can be heard in the first instance only before such Commission.—Oregon R. & Navigation Co. v. Coolidge, Or., 116 Pac. 93.

36.——Intoxicating Liquors. — State courts cannot enjoin carriers from receiving at points without the state liquors for transportation and delivery to consignees within the state, though intended to be sold by them in violation of the laws of the state.—Gulf, C. & S. F. Ry. Co. v. State, Okl., 116 Pac. 176.

37. **Constitutional Law**—Distinctions.—Where an act may cause greater damage and inconvenience in cities than in villages of the state, it is not violative of the Constitution nor of the principles of sound legislation to make a distinction.—People ex rel. Enright v. Meyers, 129 N. Y. Supp. 1099.

38. **Contracts**—Consideration.—Where consideration of a contract is that members of plaintiff club shall join defendant club, their failure to do so was a failure of consideration. —New Orleans Polo Club v. New Orleans Jockey Club, La., 55 So. 668.

39.——False Registration.—Generally, one of ordinary intelligence dealing with another, in the absence of any fiduciary relation, cannot avoid a contract on the ground of false representations if he has not used ordinary care.—Winter v. Johnson, S. D., 131 N. W. 1020.

40.——Interpretation.—When a contract is made and to be performed in the same state, the law thereof enters into it as a factor and controls its interpretation and legal effect, in the absence of provision to the contrary.—Kavanaugh v. Supreme Council of Royal League, Mo., 138 S. W. 359.

41.——Repugnancy.—Where two clauses of a contract are so repugnant to each other that they cannot stand together, the first is to be given effect, and the latter rejected.—Henne v. Summers, Cal., 116 Pac. 86.

42. **Corporations**—Action by Stockholders.—A stockholder may sue, where a corporation refuses, only where the rights of the corporation are involved.—Starr v. Heald, Okl., 116 Pac. 188.

43.——Jurisdiction.—Where a foreign corporation has property and carries on business by means of agents within the state, it may be sued in Illinois by service of process on such agent.—Booz v. Texas & P. Ry. Co., Ill., 95 N. E. 460.

44.——Liability of Stockholders.—Majority stockholders are not individually liable for the corporation's breach of a contract of employment.—Badere v. Goodrich, Wash., 116 Pac. 274.

45.——Sale of Assets.—Where a corporation was organized to lease and sell mineral lands, a majority of its stockholders could authorize a sale of all of its lands over the protest of minority stockholders.—Maben v. Gulf Coke & Coal Co., Ala., 55 So. 607.

46. **Customs and Usages**—Pleading.—A local custom or one applying to a special business must be pleaded by the party relying on it.—Smith v. Stewart, Okl., 116 Pac. 182.

47. **Damages**—Proximate Cause. — Where plaintiff, suing for negligent injury, had a latent diseased condition which in itself did not cause pain and suffering, but such condition plus the accident caused pain, the accident, and not the condition, was the proximate cause of the suffering.—Jones v. City of Caldwell, Idaho, 116 Pac. 110.

48. **Deeds**—Building Restrictions.—A grantor of a block divided into lots and subject to building restrictions, or the owners of lots therein, may not change building restrictions without the consent of all purchasing under covenants providing for such restrictions.—Noel v. Hill, Mo., 138 S. W. 364.

49.——Constructive Trust.—That title to property purchased with the money of one person was taken in the name of another to avoid payment of a judgment where such land was not the subject of fraudulent alienation, held not to estop the owner from suing to recover the title.—Cowles v. Cowles, Neb., 131 N. W. 738.

50.——Presumption of Acceptance.—Actual delivery and acceptance of a deed to an infant is not necessary to vest title in the infant, nor need the infant have knowledge of the conveyance; it being the duty of the court to declare an acceptance for him if the conveyance is for his benefit.—Hill v. Kreiger, Ill., 95 N. E. 468.

51. **Depositions**—Waiver of Objection.—Objection to the admissibility of a deposition on specified grounds waives other grounds.—People v. Mullally, Cal., 116 Pac. 88.

52. **Descent and Distribution**—Right of Action.—The heir cannot sue on a note belonging to deceased at her death, but action must be by the personal representative.—Boughner v. Sharp, Ky., 138 S. W. 375.

53. **Divorce**—Condonation.—Voluntary sexual intercourse by wife with husband while entertaining a belief of his guilt of adultery, based on suspicion only, and not on evidence, held not a condonation of the offense.—Johnson v. Johnson, N. J., 80 Atl. 119.

54.——Jurisdiction.—The power to grant divorce a vinculo is not within the general jurisdiction of courts of equity.—Martin v. Martin, Ala., 55 So. 632.

55. **Ejectment**—Color of Title.—Color of title to an entire 40-acre tract, with actual possession of the north half, but only after defendant acquired actual possession of the south half, was insufficient to entitle plaintiff to recover the south half in ejectment.—Smith v. Steiner & Lobman, Ala., 55 So. 606.

56. **Eminent Domain**—Prior Public Use.—It was no objection to the taking of land belonging to the state, and used as a part of university grounds for street purposes, that it was already subjected to a public use, to-wit, that of education.—Roberts v. City of Seattle, Wash., 116 Pac. 25.

57. **Equity**—Statute of Limitations.—There being concurrent remedy in law and at equity for breach by a trustee under a deed of trust of his contract to hold secured bonds, held, the

statute of limitations may be interposed.—Bowes v. Cannon, Colo., 116 Pac. 336.

58. **Executors and Administrators**—Situs of Debt.—The situs of a deposit in a bank as property after the death of the depositor is at the residence of the debtor.—In re Lansing's Estate, Minn., 131 N. W. 1010.

59. **False Pretenses**—Evidence.—In a prosecution for obtaining money under false pretenses, evidence that the defendant did not repay the money is inadmissible.—McIntyre v. State, Ala., 55 So. 639.

60. **Fraudulent Conveyances**—Preference.—Insolvent debtor held entitled to pay one creditor to the exclusion of others, provided the transaction be in good faith.—Edmondson v. Coughram, Tex., 138 S. W. 435.

61.——Vacating Conveyance.—One is not entitled to vacation of a conveyance as having been made to delay creditors without proving that he was a creditor.—Clayton v. Clayton, Ill., 95 N. E. 480.

62. **Frauds, Statute of**—Easement.—A contract creating an easement held to create an interest in land within the statute of frauds.—Indianapolis Southern R. Co. v. Wycoff, Ind., 95 N. E. 442.

63. **Gaming**—Bank Check.—A check, on discontinuance of an action on a check given for money lost at gambling, held invalid, so that no action could be maintained thereon.—Moore v. Blanck, 129 N. Y. Supp. 1105.

64. **Husband and Wife**—Criminal Conversation.—In an action by a husband for criminal conversation, the question whether the married life of the husband and his wife was a happy one is at issue.—Ward v. Thompson, Wis., 131 N. W. 1006.

65.——Criminal Law.—A husband is not liable criminally for his wife's offenses, unless he aids, procures, or acquiesces in their commission.—Lumpkin v. City of Atlanta, Ga., 71 S. E. 755.

66. **Infants**—Guardian ad Litem.—Appearance of an infant defendant by a solicitor, without the appointment of a guardian ad litem to represent his interests, held insufficient to sustain a judgment against him.—Thurston v. Tubbs, Ill., 95 N. E. 479.

67. **Injunction**—Irreparable Injury.—Irreparable injury or damage which may be prevented by injunction includes damage "irreparable" in the sense that it cannot be estimated except by conjecture.—Columbia College of Music & School of Dramatic Art v. Tunberg, Wash., 116 Pac. 280.

68. **Insurance**—By-Laws.—A member of a mutual benefit society, having agreed to be bound by by-laws in force or to be thereafter enacted, held subject to a subsequently enacted by-law, providing for forfeiture in case the member engaged in the retail liquor business.—Grand Lodge A. O. U. W. of Connecticut v. Burns, Conn., 80 Atl. 157.

69.——Construction.—Where a fidelity bond was in the nature of an insurance contract, and was executed for a money consideration, all provisions tending to work a forfeiture should be construed most strongly against the surety.—United American Fire Ins. Co. v. American Bonding Co. of Baltimore, Wis., 131 N. W. 994.

70.——Reinsurance.—An insurance broker held liable to his principal, with whom he had agreed to procure reinsurance, for failure to notify the principal that the present insurance on the property was worthless; the insurer having become insolvent.—Diamond v. Duncan, Tex., 138 S. W. 429.

71.——Ultra Vires.—Where insured performed his contract, and insurer received and retained all the premiums paid, he cannot defend on the ground that the contract was ultra vires.—Davis v. National Casualty Co., Minn., 131 N. W. 1013.

72. **Land Department**—Collateral Attack.—The Land Department having been vested by Congress with the right to determine the character of public lands and to convey the same if found to be of a specified character, its determination of the facts preliminary to the issuance of a patent is conclusive against collateral attack.—Roberts v. Southern Pac. Co., C. C., 186 Fed. 934.

73. **Liability of Agent**—Non-Disclosure of Agency.—An officer of an interurban railroad company making a contract held personally liable, where he did not disclose his agency.—Polk v. Haworth, Ind., 95 N. E. 332.

74. **Libel and Slander**—Charge of Crime.—Publication held to amount to a charge of crime where the general reader would have so understood the language used.—Hearst v. New Yorker Staats Zeitung, 129 N. Y. Supp. 1089.

75. **Limitation of Actions**—Tolling Statute.—The statute, having commenced to run against a cause of action, before death of the holder, continues to run after his death.—Boughner v. Sharp, Ky., 138 S. W. 375.

76. **Mandamus**—Municipal Judge.—Mandamus held not to lie to compel a municipal judge to institute a prosecution for a violation of a city ordinance.—Collins v. Grant, Or., 116 Pac. 334.

77. **Marriage**—Annulment.—To authorize annulment of a marriage because contracted through fear, it must be clearly shown that plaintiff's will was destroyed by his fear.—Pray v. Pray, La., 55 So. 666.

78. **Master and Servant**—Assumption of Risk.—A man employed upon an oil derrick does not assume the risk of his employer's negligence in failing properly to inspect the chains by which the drill is driven.—Underwood v. Gulf Refining Co. of Louisiana, La., 55 So. 641.

79.——Defective Appliance.—A servant voluntarily using an appliance known by him to be defective, and realizing its dangerous condition, assumes the risk thereof, even though he is not negligent in the use of the appliance.—Helena Hardwood Lumber Co. v. Maynard, Ark., 138 S. W. 469.

80.——Instructions.—An employer properly instructing the operators of an elevator in his building held not required to employ a watchman to see that the operators obeyed the instructions.—Kennedy v. John Wanamaker, New York, 129 N. Y. Supp. 1053.

81.——Proximate Cause.—A master's negligence cannot be held to be the proximate cause of an injury to his servant, when such an injury could not have been foreseen.—Koutsky v. Forster-Whitman Lumber Co., Wis., 131 N. W. 1001.

82.——Scope of Employment.—Where a servant has assaulted a third person for malicious personal reasons, the master is not liable.—Linck v. Matheson, Wash., 116 Pac. 282.

83. **Money Received**—Action for.—Where one person has received money of another which in honesty and good conscience he cannot retain, an action will lie either at law or in equity by the party entitled to recover the money back.—Ingram v. Posey, Tex., 138 S. W. 421.

84. **Municipal Corporations**—Notice of Defect.—A city is not chargeable with notice of a defect in a sidewalk because a subordinate employee having no supervision of the streets may have known of it.—Owen v. City of Seattle, Wash., 116 Pac. 261.

85. **Negligence**—Proximate Cause.—To warrant a finding that negligence is the proximate cause of an injury, it must appear that the injury was the natural and probable consequence of the negligence or wrongful act, and that it ought to have been foreseen in the light of the attending circumstances.—Allison v. City of Fredericksburg, Va., 71 S. E. 525.

86. **Nuisance**—Spite Fence.—One who built a spite fence to deter other persons from enforcing an injunction which restrained him from keeping dogs in the neighborhood may be compelled to remove the fence.—Wilson v. Irwin, Ky., 138 S. W. 373.

87. **Parent and Child**—Negligence of Physician.—A father has a right of action against a physician whose negligent treatment of his minor son put him to great expense in curing his son, and caused a loss of the son's services.—Otey v. Bradley, Wash., 8 Pac. 1045.

88. **Partition**—Accrual of Action.—A suit for the partition of the real estate of a decedent may be brought before the time has expired for the filing of claims against the estate.—Mullinnix v. Brown, Iowa, 131 N. W. 671.

89. **Partnership**—Accounting.—Where the capital contributed by one partner was apparatus to be used in the business, depreciation therein was a loss of capital to be borne by the partnership.—In re Hall, R. I., 79 Atl. 966.

90.——Test of.—The ultimate and conclusive test of a partnership is the co-ownership of the

profits of the business as profits.—Steele v. Michigan Buggy Co., Ind., 95 N. E. 435.

91. **Physicians and Surgeons**—Ordinary Care.—A physician employed by a hospital who undertakes with the assent of a patient of the hospital to treat him held required to exercise ordinary care.—Burnham v. Stillings, N. H., 79 Atl. 987.

92. **Principal and Agent**—Agency.—No one can become an agent except by consent of the principal either express or implied from the particular circumstances.—Plummer v. Knight, Mo., 137 S. W. 1019.

93.——Declarations of Agent.—Agency cannot be proved by the declarations of the purported agent.—Johnson County Savings Bank v. W. L. Richardson & Son, Ga., 71 S. E. 757.

94.——Duty of Agent.—An agent cannot purchase for himself that which his duty requires him to sell for his principal.—Blank v. Aronson, C. C. A., 187 Fed. 241.

95.——Estoppel.—In an action for breach of contract by selling automobiles in plaintiff's territory, defendant is estopped to claim that plaintiff would not have made the sales.—Sparks v. Reliable Dayton Motor Car Co., Kan., 116 Pac. 363.

96.——Fraud by Agent.—An architect employed to furnish working plans and specifications and to superintend the construction of a building held the agent of the owner and where he breaches his duty to the owner, he thereby destroys his right to compensation.—Audubon Bldg. Co. v. F. M. Andrews & Co., C. C. A., 187 Fed. 254.

97.——Fraud by Agent.—An agent for the sale of land, who fraudulently procured a conveyance to himself, on rescission by the grantor and a cancellation of the deed by a court of equity, is not entitled to an allowance for improvements made, although charged with the rents.—Blank v. Aronson, C. C. A., 187 Fed. 241.

98. **Principal and Surety**—Extension.—Extension of time for performance by a principal debtor held to discharge a surety not assenting to such extension.—Fales v. McDonald, R. I., 79 Atl. 969.

99.——Liability of Surety.—The liability of a surety is the same as that of the principal; the creditor being under no obligation to first look to the principal before resorting to the surety.—Manson & Shell v. Rawlings' Ex'x., Va., 71 S. E. 564.

100. **Prohibition**—Remedy.—Prohibition does not lie to arrest threatened acts of a justice court to enforce by execution or otherwise a void judgment rendered by it.—Campbell v. Durand, Utah, 8 Pac. 986.

101. **Public Lands**—Actual Settlers.—A breach of a condition in a grant of lands to a railroad company that the land should be sold only to actual settlers, in limited quantities, and at a fixed price, was not waived by the government because it remained silent when sales were made in violation of such condition, where there was no action to mislead the grantee or create an estoppel.—United States v. Oregon & C. R. Co., C. C., 186 Fed. 861.

102. **Public Service Corporations**—Regulation of Rates.—The right of every sovereign state to regulate public service corporations and the rates to be charged by them, subject to the provisions of the fourteenth constitutional amendment prohibiting deprivation of one's property without due process of law and other constitutional provisions, rests upon the police powers of the state.—In re Arkansas Rate Cases, C. C., 187 Fed. 290.

103. **Railroads**—Negligence at Crossing.—A person approaching a railroad crossing has a right to expect that the railroad will perform its duty, and give the statutory crossing signal.—Toledo, St. L. & W. R. Co. v. Lander, Ind., 95 N. E. 319.

104.——Ordinance.—An ordinance prohibiting a railroad "shifting" cars, except at certain hours, in the heart of the city, or letting them stand there for more than five minutes, held a valid exercise of the police power.—Atlantic Coast Line R. Co. v. City of Goldsboro, N. C., 71 S. E. 514.

105.——Trespassers.—Mere acquiescence by a railroad company in the use of its track by trespassers held not to confer a right to use it or create an obligation except to use ordinary care to prevent injury after discovery of peril.—Baltimore & O. R. Co. v. State, Md., 80 Atl. 170.

106. **Remainderman**—Accrual of Action.—Right of remainderman under testamentary trust to sue trustee appointed by will or trustee de son tort accrues only when the remainderman becomes entitled to the property.—Hart v. Goadby, 129 N. Y. Supp. 892.

107. **Removal of Causes**—Courts.—The question of the removal of an action in a state court to the federal court held for the state court.—Chesapeake & O. Ry. v. Banks' Adm'r., Ky., 137 S. W. 1066.

108.——Jurisdiction.—Though a party may allege facts in his complaint from which it appears that more than $2,000 is due him, yet, if he limit his demand to less than that amount, the cause cannot be removed to the federal court on the ground of diverse citizenship.—Lesh v. Bailey, Ind., 95 N. E. 341.

109. **Sales**—Election to Accept.—Retention of elevator by buyer after knowledge of defect and continuous use for nearly two years held an election to accept it in its defective condition.—Otis Elevator Co. v. Headley, N. J., 80 Atl. 109.

110.——Rescission.—Where times and quantities of deliveries have not been strictly observed, buyer cannot suddenly rescind without due warning.—Charles J. Webb & Co. v. Novelty Hosiery Co., Pa., 80 Atl. 173.

111.——Action on Warranty.—Where purchasers of a horse under a contract of warranty sold him without assigning it, but making the same warranties on breach thereof they could sue the original warrantor.—Olson Bros. v. Hurd, Idaho, 116 Pac. 308.

112. **Set-Off and Counterclaim**—Partnership.—Partnership demands and demands due to individual partners cannot be set off against each other.—Edmonson v. Thomasson, Va., 71 S. E. 536.

113. **Specific Performance**—Election of Remedies.—The fact that one has a remedy at law held not to take away his equitable remedy to compel specific performance of a contract.—City of Birmingham v. Forney, Ala., 55 So. 618.

114.——Impossibility of.—Decree for specific performance held erroneous, where conveyance had been rendered impossible by foreclosure of mortgage and expiration of time of redemption.—Baumgartner v. Corliss, Minn., 131 N. W. 638.

115. **Standing Timber**—Sale.—An owner conveying standing timber, and subsequently conveying the land subject to a reservation, held required to exercise the reserved rights within a reasonable time after the expiration of the period fixed for the removal of the timber.—Carpenter v. Camp Mfg. Co., Va., 71 S. E. 559.

116. **Trade-Marks and Trade Names**—Intent to Deceive.—The copying by defendant of the design of an article made by complainant, which is unpatented, does not constitute unfair competition, where there is no intent nor attempt to deceive purchasers as to the origin of the goods.—Keystone Type Foundry v. Portland Pub. Co., C. C. A., 186 Fed. 690.

117. **Trespass**—Joint Tortfeasors.—One who was present at the commission of a trespass, encouraging it by words, gestures, looks, or signs, or who countenances and approves it, held in law an aider and abettor.—Hunt v. Di Bacco, W. Va., 71 S. E. 584.

118. **Trial**—Error in Instructions.—An instruction omitting a necessary element of defendant's liability to plaintiff could not be cured by another instruction correctly stating the law.—Steele v. Michigan Buggy Co., Ind., 95 N. E. 435.

119. **Trusts**—Joint Purchase.—A joint purchase of land and contribution to purchase money, and the taking of title in the name of one of the purchasers, under an agreement between them, held to make him a trustee for the other to the extent of his agreed interest.—Weber v. Whidden, Wash., 8 Pac. 1046.

120.——Trustee's Compensation.—A trustee is not entitled to compensation for personal trouble and loss of time, in the absence of some provision of the statutes, or of the instrument creating a trust allowing him compensation.—Fox v. Fox, Ill., 95 N. E. 498.

Central Law Journal.

A LEGAL WEEKLY NEWSPAPER.

Published by

Central Law Journal Company

420 MARKET STREET, ST. LOUIS, MO.

To whom all communications should be addressed.

Subscription price, Five Dollars per annum, in advance. Subscription price, including two binders for holding two volumes, saving the necessity for binding in book form, Six Dollars. Single numbers, Twenty-five Cents.

Entered at the Post Office, St. Louis, Mo., as second-class matter.

NEEDHAM C. COLLIER, EDITOR-IN-CHIEF.
ALEXANDER H. ROBBINS, MANAGING EDITOR.

CONTENTS.